No. 95-853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

M.L.B.,
Petitioner,
v.
S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

MIKE MOORE
Attorney General
State of Mississippi
RICKEY T. MOORE *
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680
Counsel for Respondent
State of Mississippi
* Counsel of Record

February 20, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-853

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent State of Mississippi respectfully requests that this Court deny petition for a writ of certiorari seeking review of the August 31, 1995 opinion of the Mississippi Supreme Court. That opinion is unreported but is reproduced in the appendix of the petition for writ of certiorari. The Mississippi Supreme Court denied petitioner's motion to appeal in forma pauperis holding that the right to proceed in forma pauperis in civil cases exists only at the trial level.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE RULING OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN CONFORMITY WITH THIS COURT'S RULING IN *ORTWEIN v. SCHWAB*, 410 U.S. 656 (1973) AND EVERY CIRCUIT COURT OF APPEALS WHICH HAS ADDRESSED THE SAME OR SIMILAR ISSUES.

The decision of the Mississippi Supreme Court in this case holds that the right to proceed in forma pauperis in civil cases exists only at the trial level.[1] This ruling is in conformity with this Court's decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973).[2] In *Ortwein*, this Court held that Oregon's $25 appellate court filing fee (1) was not a denial of due process, because the petitioners received agency pre-termination evidentiary hearings meeting due process requirements; (2) did not violate the equal protection clause, as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses; and (3) did not violate the equal protection clause as arbitrary and capricious in allowing others to appeal in forma pauperis. This Court specifically rejected appellants reliance, as petitioners herein, on *Boddie v. Connecticut*, 401 U.S. 371 (1971), noting that *Boddie* "was not concerned with post-hearing review." 410 U.S. at 659.

The Fifth Circuit Court of Appeals in *Nickens v. Melton*, 38 F.3d 183 (5th Cir. 1994) addressed and rejected the arguments raised by petitioner herein. The

[1] *See also Moreno v. State*, 637 So.2d 200 (Miss. 1994), *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986), and *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941).

[2] *See also United States v. Kras*, 409 U.S. 434 (1973) (rejecting a challenge to a filing fee by an indigent debtor who sought access to bankruptcy court); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the due process clause of the Fourteenth Amendment).

Court, relying on this Court's decision in *Ortwein* held that Miss. Code Ann. § 11-53-17 (1993) allows a petitioner to proceed in forma pauperis at the trial court level and therefore provides adequate post-deprivation remedies to satisfy due process. *Id.* at 185; *see also Lindsey v. Normet*, 405 U.S. 56 (1972) (holding that a State does not have to provide appellant review if a full and fair hearing on the merits has been provided)[3]; *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "Due process does not comprehend the right of appeal."); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance").

The Fifth Circuit also held that since in forma pauperis litigants are not a suspect class, the standard for equal protection purposes is whether the requirement is "rationally related to a legitimate government interest." *See Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). The Court held that requiring civil litigants to prepay appellate cost is rationally justified because it helps offset the cost of operating the appellate court system. *Nickens*, 38 F.3d at 185.

The *Griffin v. Illinois*, 351 U.S. 12 (1956) line of cases cited by petitioner are not relevant since they deal only with criminal cases.[4] Likewise, the statement by the Court in *Lassiter v. Department of Social Services*, 452 U.S. 18

[3] The Court did, however, hold that a double bond requirement for FED appellants only is arbitrary and irrational and therefore violates equal protection. *Id.* at 79.

[4] Whether or not the accused is subject to confinement is not relevant. *See Mayor v. Chicago*, 404 U.S. 189, 197 (1971) (acknowledging that the practical effect of conviction of even a petty offense could be as detrimental to the accused as forced confinement).

(1981), that appointed counsel may be required in a termination of parental rights case if there are allegations upon which criminal charges could be based is not applicable to this case. Petitioner was represented by counsel in the trial court and she has not alleged that any allegations were made upon which criminal charges could be based.

The other Circuit Courts which have addressed the issue of prepayment of appeal cost have reached the same conclusion as Mississippi and the Fifth Circuit Court of Appeals. *See, e.g., Edward B. v. Paul,* 814 F.2d 52 (1st Cir. 1987); *Hill v. State of Michigan,* 488 F.2d 609 (6th Cir. 1973), *cert. denied,* 416 U.S. 973 (1974); *Piatt v. MacDougall,* 773 F.2d 1032 (9th Cir. 1985); *Otasco, Inc. v. United States,* 689 F.2d 162 (10th Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983).

A. The Decision of the Mississippi Supreme Court Is Not in Conflict With the Third Circuit Court of Appeals.

The decision by the Court of Appeals for the Third Circuit in *Lecates v. Justice of the Peace Court No. 4,* 637 F.2d 898 (3d Cir. 1980), cited by petitioner herein as being in conflict with the decision by the Mississippi Supreme Court, does not address appeal from a hearing meeting minimum due process requirements and therefore does not conflict with the decision of the Mississippi Supreme Court. *Lecates* challenged the requirement of posting a surety bond in order to obtain a trial de novo in Superior Court after a judgment was rendered against him in a justice of the peace court. The Court noted that justice of the peace courts in Delaware are not courts of record, do not issue opinions, are presided over by persons who are not trained in the law, and do not have provision for jury trials. The Third Circuit held that the requirement of posting bond under those circumstances violated plaintiff's due process and equal protection rights.

This conclusion was based on the holding in *Boddie v. Connecticut,* 401 U.S. 371 (1971) that due process requires that persons be given a "meaningful opportunity to be heard." 401 U.S. at 377. *Lecates* held that the Delaware Constitution defines "meaningful opportunity to be heard" to include the right of trial by jury and a judge who is knowledgeable about the law. 637 F.2d at 309-10.

B. The Majority of State Courts Which Have Addressed Appeal Costs Assessed to Indigents Agree With the Mississippi Supreme Court.

It appears that the vast majority of state courts which have addressed constitutional challenges to the assessment of appellate fees to indigents have concluded that such do not violate due process or equal protection. *See, e.g., In Re Marriage of Valleroy,* 548 S.W.2d 857 (Mo. 1977) (holding that assessment of appellate fees and cost to an indigent does not violate due process where a meaningful opportunity to be heard incident to dissolution of marriage has been provided at the trial court level); and *Rich v. Lang,* 604 P.2d 1248 (Okla. 1979) (holding that due process does not require the state to furnish a transcript to an indigent on an appeal of a termination of parental rights).

Other states have established public policy through state statutes, rules, or constitutional provisions requiring the provision of transcripts for indigents in certain civil appeals, rather than on federal constitutional grounds.[5]

---

[5] Those decisions which have required that transcripts be provided to indigents based on federal constitutional grounds are aberrations based on the predilection of the individual justices rather than well reasoned opinions. *See, e.g.,* the opinion of the Court in *In the Matter of Appeal in Pima County Juvenile Action No. J-46735,* 540 P.2d 642 (Ariz. 1975) which does not even mention the *Ortwein* decision.

II. PETITIONER WAS ACCORDED ALL RIGHTS IN THE LOWER COURT TO WHICH SHE WAS ENTITLED CONSISTENT WITH WELL-ESTABLISHED PRECEDENT.

Petitioner, in her termination of parental rights hearing in the Chancery Court of Benton County, Mississippi, was represented by counsel and was accorded a full hearing on the merits in front of a judge trained in the law. This process more than met the requirements of both *Boddie v. Connecticut*, 401 U.S. 371 (1971) (requiring waiver of filing fees when a fundamental right is involved and no other means to obtain a "meaningful opportunity to be heard" is available) and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the due process clause of the Fourteenth Amendment). This process was also sufficient to meet the requirements of the Third Circuit Court of Appeals in *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (3d Cir. 1980).

Petitioner in this case was accorded all due process and equal protection to which she was entitled under well-established precedence of this Court and of all Circuit Courts of Appeal which have addressed the same or similar issues.

A. Petitioner Is Unlikely To Prevail on an Appeal.

The Chancellor, after hearing all of the evidence, found that there was clear and convincing proof to justify termination of the parental rights of petitioner in this case. Miss. Code Ann. § 93-15-109. Petitioner alleges that the primary error that she intends to urge on appeal is that the Chancery Court's decision was unsupported by, and contrary to, the evidence presented. It is highly unlikely that she would be successful since such assignments of error are reviewed under the manifest error/substantial credible evidence test.[6] *See Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
Attorney General
State of Mississippi

RICKEY T. MOORE *
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680
Counsel for Respondent
State of Mississippi

* Counsel of Record

February 20, 1996

[6] Respondents are aware of only two or three reported cases wherein the Mississippi Supreme Court has reversed a Chancellor's order terminating parental rights based on clear and convincing proof.